

MEMORANDUM

TO: Sallie Fahey
FROM: Jay T. Seeger
DATE: March 16, 2012
RE: Middle Class Tax Relief and Job Creation Act of 2011

The Middle Class Tax Relief and Job Creation Act of 2011 (the “Act”) which was recently passed by Congress contained a number of provisions applicable to the wireless communications industry. In particular, Section 6409 of the Act states:

SEC. 6409. WIRELESS FACILITIES DEPLOYMENT.

(a) Facility Modifications.

(1) **IN GENERAL.** Notwithstanding section 704 of the Telecommunication Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) **ELIGIBLE FACILITIES REQUEST.** For purposes of this subsection, the term “eligible facilities request” means any request for modification of an existing wireless tower or base station that involves

- (A) collocation of new transmission equipment;
- (B) removal of transmission equipment; or
- (C) replacement of transmission equipment.

Questions have been raised as to how this new law may affect petitions which involve the collocation of additional wireless communication facilities on existing cell towers, and whether or not any amendments should be made to the Unified Zoning Ordinance (the “UZO”). It is my opinion that no change to the UZO is required at this time.

To begin, the new law only applies to existing cell towers. Any new cell tower application is still required to comply with all provisions of the UZO.

Any existing tower should be located in either an Industrial zone or an Agricultural zone. In an Industrial zone an existing cell tower is a permitted use, and any modification would be permitted subject to the setback and height restriction in UZO sections 4-4 and 4-5, respectively.

However, modification which involved a change in setback or height would be a change in “physical dimensions” which would not be subject to Section 6409 of the Act.

In an Agricultural zone an existing cell tower would be limited to the site plan for the special exception under which its use was granted. That site plan would show the tower height and dimensions along with any base stations. Any modification to the tower or the base station which differs from the site plan would be a change in dimensions to which Section 6409 of the Act would not apply, and any change which was within the site plan would be permitted.

Existing cell towers which are located in other than Industrial or Agricultural zones would be nonconforming uses. The new law only applies to modifications which do not “substantially change the physical dimensions of such tower or base station”.

This limitation is consistent with UZO section 5-1-2(c) (1). So even in a nonconforming use situation there is no need to amend the UZO.

Finally, an illegal cell tower is not made legal by the new law. It would not be considered an existing cell tower. So it would be treated as a new tower application.

JTS/dlw